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No. 04-888

Supreme Court, U.S.
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In the
SUPREME COURT OF THE UNITED STATES

HEATHER BURTON, et al.,
Petitioners,

v.

PATRICIA RICHMOND and MARY ANN ALLEN,
Respondents.

On Petition for Writ of Certiorari
to the United States Court of Appeals
for the Eighth Circuit

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

JEREMIAH W. (JAY) NIXON
Attorney General of Missouri
JAMES R. LAYTON
State Solicitor
Counsel of Record
JOEL E. ANDERSON
Assistant Attorney General
P.O. Box 899
Jefferson City, MO 65102
Phone: (573) 751-3321
Fax: (573) 751-9456

QUESTION PRESENTED

1. When a state child services agency recommends that a juvenile court award legal custody of six minor children to the children's relatives with whom they are living, have its agents also acquired a constitutional duty to protect those children from being abused by those relatives?

2. Would a reasonable official working for a state child services agency in 1985 have understood that when a juvenile court awards legal custody of children to the relatives of those children with whom they are living with supervision by the child services agency, agency officials have a duty to protect those children from those relatives, and that deliberate indifference to the risks faced by those children deprived the children of due process?

PARTIES TO THE PROCEEDING

Respondents are Patricia Richmond and Mary Ann Allen, two former social workers of the Missouri Department of Social Services, Division of Family Services (DFS).

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PROCEDURAL HISTORY

The opinion below, *Burton v. Richmond*, is reported at 370 F.3d 723 (8th Cir. 2004) (*Burton II*), and is found in the Appendix to the Cert Petition ("Cert. App.") at App.1 - App.12.

Petitioners, children of Shirley Button, who assert that they were abused by their step-grandfather, filed an action seeking damages from six Missouri social workers who Petitioners alleged failed to protect them from physical and sexual abuse. The District Court denied Respondents' motion to dismiss, finding that Respondents were not entitled to qualified immunity from suit based on the pleadings. Respon-

dents filed an interlocutory appeal, and the Eighth Circuit affirmed the District Court's ruling. *Burton v. Richmond*, 276 F.3d 973 (8th Cir. 2002) (*Burton I*).

The District Court subsequently denied qualified immunity to Respondents on their motion for summary judgment. On appeal, the Eighth Circuit reversed, finding that Petitioners' evidence before the District Court did not establish that there was a "special relationship" that would give rise to a duty to protect, and that the District Court was in error in relying upon the prior decision (*Burton I*) as the law of the case. In *Burton II*, the court found that the facts in Petitioners' complaint were not supported by the record developed by discovery and before the District Court.

Petitioners erroneously set forth the Eighth Circuit holding in *Burton II*. Petitioners are correct that the court found no "special relationship" between Petitioners and Respondents. Pet. App. 8. Petitioners suggest that this finding was made solely because DFS was never granted legal custody of Petitioners. Pet. 2. Actually, the Eighth Circuit held that liability is imposed only where the state exercises its power to restrain an individual's liberty, rendering the individual unable to care for himself. Pet. App. 8.

This conclusion followed from the court's observation that: DFS did not assume actual, physical custody of the Petitioners; the circuit court order at issue did not grant legal custody to DFS, but instead ordered only supervision; and DFS never placed the children. In sum, contrary to Petitioners' assertion, the Eighth Circuit did not require a showing of legal custody in order to find a "special relationship." Pet. App. 7-8.

STATEMENT OF FACTS

The facts of record on summary judgment and those before the Eight Circuit are accurately summarized in the Eighth Circuit's opinion in *Burton II*. In large part, Respondents agree with the substance of Petitioners' restatement of the facts. But Petitioners reference some "facts" for which there is no support on the record, and that go beyond the findings of the courts below, or that leave out important detail.

1. Petitioners state that Rhonda contacted Respondent Patricia Richmond after Rhonda and the maternal grandmother, Jean, divided the children up between their homes for further care. Pet. 3. Petitioners state that Rhonda explained "the situation" to Richmond, after which Respondent Allen proceeded to obtain a court order of placement. Pet. 3. But the facts of record show that Rhonda contacted Richmond to request the assistance of the juvenile court – not with some generalized request for government assistance, but specifically to obtain an order permitting the children to officially reside in the homes of Rhonda and Jean, as the two of them had arranged. This request was relayed to the juvenile officer, who in turn recommended that the juvenile court enter an order in accordance with the request. Pet. App. 2-3.

The juvenile court did not order a background check and a home study. Pet. App. 10. Instead, it made the children wards of the court and confirmed their placement in the family homes, retaining legal custody in the juvenile court. Pet. App. 3.

2. With regard to the need for a home study, Petitioners omit the undisputed fact that a home study and background check were completed and submitted to the court in 1977 when the children were previously placed with the Huffmans by the same judge of the same court in response to a

recommendation by the same juvenile officer. Pet. App. 10. The 1977 study revealed Jim Huffman's criminal record and parole violation – and it included a recommendation from his parole officer that he could provide a good home for these children. Pet. App. 3, 10. Jim Huffman's criminal record was no different in 1985.

3. Petitioners state that DFS was ordered to maintain "day-to-day" supervision of the children, and then go on to state that the Huffmans were required to obtain approval from DFS for out of state travel or medical care. Pet. 4. In fact, DFS was merely ordered to supervise the court-ordered placement. Pet. App. 3. The words "day-to-day" appear nowhere in the record or the court order. The only day-to-day supervision of the children was by the Huffmans. DFS made periodic visits. No part of the court order required the Huffmans to obtain approval or permission from DFS to do anything at all.

4. Petitioners state that Rhonda reported a disturbance caused by Shirley at a family barbecue when Shirley accused Jim Huffman of sexually abusing Petitioner Amy Burton. Pet. 4. Petitioners state that this incident was promptly reported by Shirley to Richmond. Pet. 4.

The facts of record show that Shirley reported to Richmond that Amy told her that someone was hurting her "down there." Pet. App. 3. There are no facts showing that Shirley reported the barbecue incident to Richmond. On a separate occasion, Rhonda told Allen that Shirley caused a disturbance at a family barbecue by accusing Jim Huffman of sexually abusing Amy. Pet. App. 3.

REASONS WHY THE WRIT SHOULD BE DENIED

1. Rather than present a federal question of when and how a "special relationship" is formed, the Eighth Circuit appropriately applied well-established federal constitutional law.

Petitioners frame the question presented as whether a "special relationship," as that term was used in *DeShaney v. Winnebago County Soc. Servs. Dept.*, 489 U.S. 189 (1989), requires that a state actor have "legal custody" of a child. But the court below announced no such rule. The court simply considered the facts of record and concluded that Respondents did not and could not so restrain the liberty of Petitioners that a duty to protect them arose.

As part of the analysis, the Eighth Circuit noted that the children had undergone a court-ordered placement that simply "legalized" the status quo of the children in a placement already made by family members. In that order, the court did not grant DFS legal custody, but instead placed physical custody in the Huffmans and ordered DFS to supervise.

Under Missouri law, DFS lacks independent custodial authority with regard to children. In fact, DFS cannot even take a child into emergency, temporary custody. Mo. Rev. Stat. § 210.125. Observing that the circuit court placed the children, DFS never had actual custody, and DFS was not granted legal custody, the court below concluded that DFS did not have the authority to exercise the restraint necessary to trigger a substantive due process duty to protect – despite the court's order that DFS supervise the family's court-sanctioned placement.

To draw DFS further into the case based on the "supervision" requirement, Petitioners make a series of unsupported factual allegations regarding what the "supervision" actually

consisted of, *i.e.*, that the Huffman family was required to obtain DFS approval for medical care or for travel, and that DFS held itself out as having custodial rights over the children. Pet. 7-8. Petitioners then jump from "supervision" to a statute that does not use that term: they cite to Missouri's marriage dissolutions statutes for a definition of "custody" that highlights medical care and health issues. Pet. 7; Mo. Rev. Stat. § 452.375. The definition they set forth is actually a definition of "joint physical custody" that appears in the context of dissolution issues over which parent is awarded which decision-making rights. But if the question here were "custody," the correct provision to cite would be the one cited to the court below (Mo. Rev. Stat. § 211.021(4)), which appears in Missouri's statutory sections applicable to the juvenile courts. "Legal custody" is defined there as "the right to the care, custody and control of a child and the duty to provide food, clothing, shelter, ordinary medical care, education, treatment and discipline of a child." *Id.* The juvenile court did not grant any of these custody "rights" to DFS. Though Petitioner wants desperately to mix "supervision" and "custody" together in order to invoke the rights they could claim if DFS had "custody," the fact is that DFS had no such rights.

Nor could DFS assert any authority in these circumstances, other than the authority that the juvenile court expressly ordered. Missouri has extensive statutory provisions governing child protection and how children may be placed in various settings by a juvenile court. Mo. Rev. Stat. § 211.181 and its subparts set forth these dispositions, and placing a child in the custody of a public agency (DFS) for placement in various home settings is only one of those provisions. There are many provisions that govern direct court placements. None of those provisions place any duties on or grant authority to DFS outside of an order of the court.

The complaint alleged facts showing a custodial

situation between the children and the DFS. Pet. App. 7. But having failed to provide factual support for that claim on summary judgment – for the simple reason that such support does not exist – Petitioners' effort to draw this Court into the dispute on that premise should fail.

2. The petition does not present a conflict among the circuits as to when the law was clearly established on the point actually at issue, i.e., whether and when state employees owe a duty of protection to children whose placement with family members they are to supervise.

To find a conflict among the circuits, Petitioners frame the question about when the state owes a duty to children in its care very broadly – in fact, too broadly to be useful.

Here, the children were in the State's care once the juvenile court made the children wards of that court, and then placed them with the Huffman's. But this is not a suit against the State; it is a suit against respondents Richmond and Allen in their individual capacities. Thus, the relevant issue is the duty created by the "supervision" authority granted by the court to DFS and how that authority was exercised by Richmond and Allen. And Petitioners identify no conflict among holdings on "supervision" issues.

Had this matter proceeded differently, Petitioners might have a had colorable claim of conflict – or at least that this case presented a constitutional question that this Court has previously recognized but not answered. A Missouri court may, after making a child its ward, place the child in the custody of DFS. *See, e.g.*, Mo. Rev. Stat. § 211.181.1(2). After such placement, DFS decides whether to place the child in a licensed foster home, a relative placement, or other appropriate placement. *Id.* DFS has extensive regulations for foster homes, including licensing. *See, e.g.*, 13 CSR 40-60 *et seq.* Had the

matter taken that course — i.e., had the juvenile court ordered the children into DFS custody, and had DFS then placed the children with the Huffman's — the case might have implicated the question explicitly left open by *DeShaney*: whether a child in a "foster home operated by [the state's] agents" is sufficiently analogous to incarceration to give rise to a duty to protect. *DeShaney*, 489 U.S. at 201 n. 9. But because this case did not follow that course, it did not raise that question, and the court of appeals did not attempt to answer it. Therefore this case does not provide a vehicle for examining whether there is a circuit split on the issue.

In fact, the Eighth Circuit plainly recognized that there is a split of authority on the question of whether children in the mid-1980s had a clearly established right to safety in foster care after having been taken into state custody. Pet. App. 11. But the Eighth Circuit also emphasized the basic reason that the petition here should not be granted: that this is not a case about the rights of children in the custody of a state agency, whether placed in foster homes or elsewhere. It is, at most, about "supervision" of a family-arranged, court-approved placement. And as to that question, Petitioners identify no conflicting authority, nor any other basis for demanding this Court's attention.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

JEREMIAH W. (JAY) NIXON
Attorney General
JAMES R. LAYTON
State Solicitor
Counsel of Record
JOEL E. ANDERSON
Assistant Attorney General
P.O. Box 899
Jefferson City, MO 65102
Phone: (573) 751-3321
Fax: (573) 751-9456

Counsel for Respondents

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